

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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LENORE M. FARBER,

Plaintiff-Appellee,

v

ALFRED S. FARBER,

Defendant-Appellant.

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UNPUBLISHED

February 18, 2000

No. 207535

Oakland Circuit Court

LC No. 97-544764 DO

Before: Jansen, P.J., and Collins and J.B. Sullivan\*, J.J.

PER CURIAM.

Defendant appeals as of right from a default judgment of divorce and the trial court's denial of his motion to set aside the default judgment. We reverse in part and remand.

The parties had been married for forty-nine years when plaintiff filed for divorce. Defendant did not answer the complaint. Just a little more than two months after the complaint was filed, plaintiff moved for entry of a default judgment against defendant. Defendant, who was properly served with both the complaint and motion for default judgment, did not appear at the motion proceedings, nor was he represented by counsel. After taking plaintiff's proofs on the complaint, which consisted of her very brief testimony, the court entered the proposed default judgment, which awarded plaintiff the parties' savings accounts and brokerage retirement accounts, two mutual funds, and the marital home. Plaintiff also received funds invested from a personal injury lawsuit settlement, her 1991 Volvo, and all of her personal property. Defendant was ordered to assume an outstanding home equity loan, all outstanding home repair bills, the outstanding balances on credit cards maintained jointly by the parties, plaintiff's attorney fees, and any joint tax liability for the calendar year 1997. Defendant was awarded money in a checking account, five insurance policies, his architectural/design business and his personal property. Except for the outstanding home equity loan, no values were attached to any of these properties or debts. Defendant filed a timely motion to set aside the default judgment, which was denied by the trial court.

The policy of this state generally favors the meritorious determination of issues and

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

therefore encourages the setting aside of defaults upon timely motion. *Huggins v MIC Gen Ins Corp*, 228 Mich App 84, 86; 578 NW2d 326 (1998). However, whether a default or a default judgment should be set aside is within the sound discretion of the trial court and will not be reversed on appeal absent a clear abuse of that discretion. *Id.* A motion to set aside a default judgment generally will be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed. MCR 2.603(D)(1); *Park v American Casualty Ins Co*, 219 Mich App 62, 66-67; 555 NW2d 720 (1996). Good cause sufficient to warrant setting aside a default can be established by a substantial defect or irregularity in the proceeding upon which the default was based, a reasonable excuse for failure to comply with the requirements which created the default, or some other reason showing that manifest injustice would result if the default were allowed to stand. *Huggins, supra*, at 87.

Defendant argues that he established “good cause” by showing both that he had a reasonable excuse for failing to timely answer plaintiff’s complaint and that manifest injustice will occur if the default judgment is allowed to stand. Defendant’s assertion of a “reasonable excuse” for failing to answer plaintiff’s complaint is that his poor mental health affected his ability to respond appropriately to plaintiff’s complaint. Defendant argues that a default judgment could not be entered against him because he was mentally incompetent. MCR 2.603(B)(3)(a); *Hackley Union National Bank & Trust v Sheneman*, 30 Mich App 1, 15; 186 NW2d 344 (1971). We find that defendant has not established that he is an incompetent person within the meaning of the court rule and therefore does not come within that rule’s protective shield. Therefore, defendant has not established a reasonable excuse for failing to answer plaintiff’s complaint for divorce.

Defendant next argues that there is good cause to set aside the default because manifest injustice would result from allowing the default judgment to stand. The showing of a meritorious defense and factual issues for trial may, under some circumstances, fulfill the “good cause” requirement by constituting evidence that manifest injustice to the defaulted party may result if the judgment is not vacated. *Park, supra* at 67. The meritorious defense and factual issues presented by defendant concern the property settlement in the default judgment. Defendant contends that the settlement is inequitable because plaintiff received approximately \$458,000 in assets, while his portion is only \$165,000.

The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. *Byington v Byington*, 224 Mich App 103, 114; 568 NW2d 141 (1997). The division need not be mathematically equal, but any significant departures from an equal distribution should be supported by a clear exposition of the court’s rationale. *Id.* at 114-115. On appeal, this Court must first review the trial court’s findings of fact regarding the valuations of marital assets under the clearly erroneous standard. Then this Court must decide whether the dispositive ruling was fair and equitable. *Welling v Welling*, 233 Mich App 708, 709; 592 NW2d 822 (1999).

The property division in the case is not rendered inequitable simply because defendant was not allowed to participate in its adjudication. *Draggoo v Draggoo*, 223 Mich App 415, 425-429; 566 NW2d 642 (1997). However, the trial court made no findings of fact regarding what assets constituted the marital estate, the valuation of those assets, what factors should be considered in distributing the marital estate, or what would constitute an equitable distribution of assets. Therefore, this Court is

unable to determine whether the property distribution was equitable.

In deciding a divorce action, the trial court must make findings of fact and dispositional rulings. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993). See also MCR 2.517(A); MCR 3.210(D). Although it is not an abuse of discretion for a trial court to adopt a plaintiff's valuation of assets in a circumstance involving a defendant's default, see *Draggoo*, *supra* at 430, here plaintiff placed no value on the assets in her complaint or motion for default judgment. Under the circumstances here, we believe it was an abuse of discretion for the trial court to adopt plaintiff's distribution scheme in which plaintiff takes all of the parties' retirement benefits and most of their savings in addition to the marital home. After all, there is no automatic rule of forfeiture even when a party deliberately conceals marital assets, and defendant's default should have been just one of the relevant facts to be weighed in distributing the marital estate in a fair and equitable fashion. See *Sands*, *supra* at 36.

Accordingly, we remand this case for the trial court to make the necessary factual findings and an equitable property distribution. See *Sparks v Sparks*, 440 Mich 141, 162-163; 485 NW2d 893 (1992). Regarding defendant's contention that the trial court erred in awarding attorney fees to plaintiff, a court may order payment of the other party's attorney fees in a divorce action provided that the party who requests attorney fees "allege[s] facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay." MCR 3.206(C). The trial court shall also reconsider the award of attorney fees in light of this requirement.

On remand, the trial court is free to hold additional hearings, take further testimony, or receive exhibits, as it deems necessary. See *Reeves v Reeves*, 226 Mich App 490, 497-498; 575 NW2d 1 (1997); *Draggoo*, *supra* at 428-429.

Reversed in part and remanded. Jurisdiction is not retained. The partial stay previously ordered by this Court is dissolved.

/s/ Kathleen Jansen

/s/ Jeffrey G. Collins

/s/ Joseph B. Sullivan